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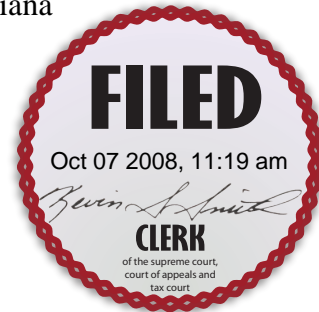
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**IN THE
COURT OF APPEALS OF INDIANA**

STATE OF INDIANA,

Appellant-Plaintiff,

VS.

RODNEY BROWN,

Appellee-Defendant.

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No. 87A01-0804-CR-194

APPEAL FROM THE WARRICK CIRCUIT COURT
The Honorable David O. Kelley, Judge
Cause No. 87C01-0712-FB-143

October 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

The State of Indiana appeals the grant of Rodney Brown's motion for discharge pursuant to Indiana Criminal Rule 4(B).¹ The sole issue raised on appeal is whether the trial court erred in granting Brown's motion for discharge. We reverse and remand for further proceedings.

In 2007, Brown was on parole for an undisclosed federal conviction. On December 12, 2007, the State charged Brown with class B felony sexual misconduct with a minor, class C felony sexual misconduct with a minor, and class D felony child solicitation,² all of which were allegedly committed between January 19, 2007, and November 28, 2007. Appellant's App. at 1, 5. At some point, the federal government lodged a detainer³ against Brown due to alleged parole violations stemming from the facts underlying the aforementioned state charges.⁴

On January 14, 2008, Brown requested a speedy trial pursuant to Criminal Rule 4(B). The trial court granted Brown's request and scheduled trial for March 4, 2008. On February 20, 2008, the State filed a motion to continue due to the unavailability of the victim. On February 25, 2008, the trial court held a hearing on the State's motion. The trial court

¹ Indiana Code Section 35-38-4-2 permits the State to appeal from "an order or judgment for the defendant, upon his motion for discharge because of delay of his trial not caused by his act ... presented and ruled upon prior to trial."

² Ind. Code §§ 35-42-4-9(a)(1); 35-42-4-9 (b)(1); 35-42-4-6(c). Both parties state that Brown was charged with two counts of class B felony sexual misconduct with a minor, but that is not reflected in the record before us.

³ A detainer is a notice to prison authorities that charges are pending against an inmate elsewhere and requesting the prison custodian to notify the sender of the detainer before releasing the inmate. *Conn v. State*, 831 N.E.2d 828, 831 n.5 (Ind. Ct. App. 2005) (citing *U.S. v. Crozier*, 259 F.3d 503, 513 (6th Cir. 2001)), *trans denied*.

⁴ The detainer is not in the record before us.

informed the State that due to Brown's request for a speedy trial pursuant to Criminal Rule 4(B), Brown would have to be released on his own recognizance if it granted the State's motion to continue. The State agreed. The trial court then granted the State's motion to continue and released Brown on his own recognizance. However, due to the federal detainer against him, Brown remained incarcerated under federal authority.

On March 24, 2008, Brown filed a motion for immediate discharge pursuant to Indiana Criminal Rule 4(B). On March 31, 2008, a hearing was held on the motion. Apparently, the federal court had found that there was probable cause to support the allegations that Brown violated his parole, and Brown was incarcerated under federal authority when he filed his motion and when the hearing was held. March 31, 2008 Tr. at 5. The trial court granted Brown's motion.

On appeal, the State argues that the trial court erred in granting Brown's motion for discharge. Brown's right to a speedy trial is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article 1, Section 12 of the Indiana Constitution. *See Clark v. State*, 659 N.E.2d 548, 551 (Ind. 1995). Indiana Criminal Rule 4 is Indiana's codification of a defendant's speedy trial right. Criminal Rule 4(B)(1) provides, in relevant part,

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of [his speedy trial motion], except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.

In this case, our review of the trial court's decision concerns matters of law, and therefore our

review is de novo. *Jenkins v. State*, 809 N.E.2d 361, 367 (Ind. Ct. App. 2004), *trans. denied*.

We first address the State's contention that Brown's motion for discharge was premature. It is well established that "when a motion for discharge for a Criminal Rule 4 violation is made prematurely, it is properly denied." *Bartley v. State*, 800 N.E.2d 193, 195 (Ind. Ct. App. 2003) (quoting *Stephenson v. State*, 742 N.E.2d 463, 487 n.21 (Ind. 2001), *cert. denied* (2002)). By its clear language, Criminal Rule 4(B) does not permit discharge until seventy days have elapsed after the speedy trial motion has been filed. For example, in *Banks v. State*, 273 Ind. 99, 402 N.E.2d 1213 (1980), the defendant filed a motion for speedy trial on November 30, 1978. On February 7, 1979, he filed a motion for discharge, which, he asserted, was the seventieth day after November 30, 1978. Our supreme court observed, "Even if that were true, his motion for discharge was properly overruled because the trial could still commence sometime on that seventieth day. Yet, our count establishes February 7 was the sixty-ninth day following the early trial motion, thus solidifying our conclusion that the motion for discharge was premature and properly overruled." *Id.* at 100, 402 N.E.2d at 1214.

Likewise, in *Bartley*, the defendant filed his motion for speedy trial under Criminal Rule 4(B) on October 3, 2002. The record was unclear as to whether Bartley filed his motion for discharge on December 10 or 12, 2002. The *Bartley* court determined that the seventieth calendar day after the motion was December 12, 2002. As a consequence, "[r]egardless of whether Bartley filed his motion to dismiss on December 10 or December 12, either motion would have been premature because the seventy-day period under Rule 4(B) had not yet expired. Thus, the trial court properly denied Bartley's motion." 800 N.E.2d at 196.

Here, Brown filed his Criminal Rule 4(B) motion for speedy trial on January 14, 2008. Brown filed his motion for discharge on March 24, 2008. Brown claims that March 24, 2008, was the seventy-first day, but he is incorrect. Criminal Rule 4(B)(2) provides,

In computing the time comprising the seventy (70) calendar days under this Criminal Rule 4(B), each and every day *after the filing of such motion* for early trial shall be counted, including every Saturday, every Sunday, and every holiday excepting only, that if the seventieth (70th) day should fall upon a Saturday, a Sunday, or a holiday, then such trial may be commenced on the next day thereafter, which is not a Saturday, Sunday, or legal holiday.

(Emphasis added.) Accordingly, the seventieth day after Brown's motion for speedy trial was March 24, 2008. Because the seventy-day time period under Rule 4(B) had not expired, Brown's motion for discharge was premature. *See Banks*, 273 Ind. at 100, 402 N.E.2d at 1214; *Bartley*, 800 N.E.2d at 196; *see also Bell v. State*, 610 N.E.2d 229, 232 (Ind. 1993) (motion for discharge was premature and properly denied where defendant filed motion for discharge on sixty-first day of seventy-day period), *superseded on other grounds by rule*; *Perry v. State*, 471 N.E.2d 270, 273 (Ind. 1984) (where motion for speedy trial was made on October 7, 1981, seventieth day following motion was December 16, 1981, and therefore motion for discharge filed on November 18, 1981, was premature).

We observe that the cases cited above for the proposition that a premature motion for discharge is properly denied also identified other bases on which to find that the particular motion at issue was properly denied. This raises the question whether pre-maturity alone is sufficient to deny a motion for discharge. We need not answer that question here because there is another reason to support a determination that the trial court erred in granting Brown's motion.

The trial court improperly granted Brown's motion for discharge because Brown was not incarcerated under the State's authority. The trial court released Brown on his own recognizance at the February 25, 2008, hearing. In *Williams v. State*, 631 N.E.2d 485, (Ind. 1994), our supreme court stated, "The purpose served by Crim. R. 4(B) is to prevent a defendant from being detained in jail for more than 70 days after requesting an early trial. A non-incarcerated defendant's right to speedy trial is implemented by the one-year limitation imposed by Ind. Crim. Rule 4(C). Once released from custody, a defendant receives no further benefit from Crim. R. 4(B)." *Id.* at 486-87 (footnote omitted).

Nevertheless, Brown argues that, due to the federal detainer lodged against him, he was "held in jail" and therefore was still entitled to the protection of Criminal Rule 4(B). In support, he cites *State v. Laslie*, 178 Ind. App. 107, 381 N.E.2d 529 (1978). Brown's reliance on *Laslie* is misplaced. The *Laslie* court specifically noted that Criminal Rule 4(B) is unavailable where the accused is incarcerated under federal authority. *Id.* at 110, 381 N.E.2d at 531; *see also Smith v. State*, 267 Ind. 167, 368 N.E.2d 1154, 1156 (1977) ("While it may be reasonable to impose the time limit of Criminal Rule 4(B) when a criminal defendant is within the exclusive control of the State of Indiana, for purposes of certainty and ease of administration of the rule, it becomes irrational to extend its application to a defendant who is incarcerated in another jurisdiction which has an interest in retaining the defendant in its custody, either for trial or to serve a sentence.").

Brown was incarcerated because of the federal detainer lodged against him, and he was therefore under the sole authority of the federal court. Accordingly, Criminal Rule 4(B) was no longer applicable to Brown. Thus, we conclude that the trial court erred in granting

Brown's motion for discharge.

Reversed and remanded for further proceedings.

KIRSCH, J., and VAIDIK, J., concur.